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481481—42

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 292

W. H. NEHER, PETITIONER

v.

A. E. HARWOOD, INDIVIDUALLY AND AS POSTMASTER OF THE CITY OF LA VERNE, CALIFORNIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The District Court of the United States for the Southern District of California, Central Division, rendered no opinion in this case.[1] The opinion of the Circuit Court of Appeals for the Ninth Circuit (R. 80–102) is reported in 128 F. (2d) 846.

[1] The District Court referred to its opinion in *Acret* v. *Harwood*, 41 F. Supp. 492, a case heard with the instant case, as discussing "the fundamental principles of law" involved in this case (R. 4). See *infra*, p. 6.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 5, 1942 (R. 103). The petition for writ of certiorari was filed August 11, 1942. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Postmaster General is an indispensable party to an action to restrain a local postmaster from carrying into effect a postal fraud order.

2. Whether the instant suit was properly dismissed for failure to state a cause of action.

STATUTE INVOLVED

The applicable portion of the statute involved is set forth in the Appendix, *infra,* pp. 12–13.

STATEMENT

On March 20, 1941, the Post Office Department forwarded to petitioner a memorandum (R. 38) charging him with violations of the postal fraud order statute.[2] The memorandum charged that petitioner was engaged in obtaining money through the mails by means of false and fraudulent representations to the effect that by placing "tuning-in" cards, filled out by the persons from

[2] Private Laboratory of W. H. Neher also was named as a respondent (R. 37–40).

whom he obtained the money, in a "cosmic generator" maintained in his "laboratory" he could bring the bodies of those persons into harmony with cosmic forces and thereby cure 99 percent of every form of disease or ailment they might have (R. 39–40). Petitioner was afforded an opportunity to show cause on April 14, 1941, why a fraud order should not be issued against him. On April 11, 1941, he filed an answer denying the charges and transmitting circular matter used in the operation of his enterprise. However, he did not appear at the hearing held on April 14, 1941, and no appearance was made on his behalf (R. 38). On May 12, 1941, there was forwarded to him a transcript of the proceedings together with a descriptive list of the exhibits and he was given until June 5, 1941, to make any further statements as to why a fraud order should not be issued against him (R. 38–39). On that date a brief was filed on his behalf (R. 38–39).

Testimony and documentary evidence introduced by the Government at the hearing established the following facts: Petitioner is a retired farmer, sixty-nine years of age, and possesses a high-school education. His enterprise consisted of the operation of a so-called cosmic generator in which, for a stated fee, he placed the name of the patron written on a card bearing a prayer (R. 47–49). Petitioner asserted that he had set up in the machine a cosmic field or atmosphere by focalizing a number of cosmic forces and cosmic

rays (R. 45). The alleged theory of the operation was that the cosmic forces generated by the machine brought the patron in harmony with the "Life Forces" surrounding him and enabled him to become cured of his bodily ills as prayed (R. 47–48). Petitioner's circular claimed that cures of 99 percent of all diseases could be effected in this manner (R. 48, 57–58). It was not claimed by petitioner that the cures were effected by the prayers or divine intervention alone; he claimed rather that they could be effected only through the interposition of his cosmic machine (R. 59). The rate charged by petitioner for the use of his machine was the tuning-in charge of fifty cents and a rental charge of one dollar per month for each name (R. 49). A family rate of three dollars per month plus a tuning-in charge of one dollar was also offered by petitioner (R. 49).

Expert testimony disclosed that neither petitioner's machine nor any other device known to science can change the direction of cosmic rays or produce a so-called cosmic field (R. 55). Expert testimony also was introduced to show that human ailments are not due to disharmony of the body with cosmic forces or radiation but result from changes and destruction of the tissues (R. 55). One individual who had filled out and forwarded a so-called prayer card to petitioner together with a remittance testified that a condition thought to be due to an attack of infantile paralysis had not been benefited (R. 56–57).

Upon the basis of the foregoing evidence the Acting Solicitor of the Post Office Department made findings of fact and recommended that a fraud order be issued (R. 37–61). Thereafter, on June 28, 1941, the Acting Postmaster General issued an order to the postmaster at La Verne, California, directing that all letters and other mail matter addressed to W. H. Neher and Private Laboratory of W. H. Neher be returned to the postmasters at the offices where they were originally mailed, for delivery to the senders with the words "Fraudulent: Mail to this address returned by order of Postmaster General" written or stamped upon the outside of the letters or other mail matter (R. 23–24).

On August 8, 1941, petitioner filed in the United States District Court for the Southern District of California a complaint against the postmaster at La Verne, who is the respondent herein (R. 7–37). The complaint alleged various facts with respect to petitioner's enterprise (R. 13–14, 31–32) and petitioner attached a copy of the Acting Solicitor's findings and recommendation (R. 25, 37–61) and other documents. Alleging that the postal fraud order statute is unconstitutional and that the fraud order was unsupported by evidence and void, the complaint prayed that the order be vacated, that respondent be enjoined from carrying out the order, and that the statute be declared unconstitutional (R. 37).

Respondent moved to dismiss the complaint on the ground that "the plaintiff has failed to state a claim upon which relief can be granted" (R. 61). Authorities to the effect that the Postmaster General was an indispensable party to the suit were filed in support of the motion, but the motion was based also upon "the other documents and papers on file in this action" (R. 61). On October 25, 1941, after a hearing upon the motion, the district court entered a minute order dismissing the complaint (R. 4). The order referred to the court's decision of the same date in *Acret* v. *Harwood,* 41 F. Supp. 492, as discussing the principles of law involved and also stated that no substantial constitutional question was presented.[3] On October 29, 1941, judgment was entered dismissing the complaint on the ground that it failed "to state a claim upon which relief can be granted" and denying an application for the convening of a three-judge court on the ground that the complaint failed to raise a substantial constitutional question warranting any relief (R. 63–64).

On appeal to the Circuit Court of Appeals for the Ninth Circuit petitioner withdrew his conten-

[3] *Acret* v. *Harwood*, supra, was a suit brought by petitioner's attorney to vacate the fraud order here involved and to enjoin the local postmasters from refusing to deliver mail sent to petitioner by the plaintiff. In its opinion sustaining the motion to dismiss the complaint in that case for failure to state a claim, the court held that the Postmaster General was an indispensable party and, apparently, based its action on that ground.

tions that the statute is unconstitutional (R. 81). The court affirmed the judgment on the grounds (1) that the Postmaster General is an indispensable party and (2) that the complaint fails to state a cause of action (R. 80–103).[4]

ARGUMENT

The principal question raised by the petition for writ of certiorari, and the only question of general importance, is whether the Postmaster General is an indispensable party in a suit to enjoin a subordinate postmaster from carrying out a fraud order issued by the Postmaster General or, as in this case, by the Acting Postmaster General; no question as to the validity of the statute pursuant to which the order was issued is presented (see Pet. 4).

1. The holding of the court below that the Postmaster General is an indispensable party conflicts with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rood* v. *Goodman*,

[4] Prior to the decision of the circuit court of appeals and to the taking of the appeal to that court, petitioner and the plaintiff in *Acret* v. *Harwood*, *supra*, filed in this Court a motion for leave to file a writ of mandamus to compel the district judge to vacate the judgments in this case and the *Acret* case and to convene a three-judge court to hear the cases (R. 5, 65–73). This Court denied the motion on December 15, 1941 (*Ex parte George Acret*, No. ——, Original, October Term, 1941), and on January 12, 1942, denied a petition for rehearing and a motion for leave to file a supplemental or amended petition for writ of mandamus.

83 F. (2d) 28, certiorari denied, 299 U. S. 551.[5] However, it accords with that of the Second Circuit in *National Conference on Legalizing Lotteries, Inc.* v. *Goldman,* 85 F. (2d) 66, and is supported by the decisions of this Court in such cases as *Warner Valley Stock Company* v. *Smith,* 165 U. S. 28; *Gnerich* v. *Rutter,* 265 U. S. 388, and *Webster* v. *Fall,* 266 U. S. 507. Although the later decision of this Court in *Colorado* v. *Toll,* 268 U. S. 228, has been variously interpreted in the lower federal courts as limiting or overruling those decisions,[6] no necessity exists to determine their applicability in this case or to resolve the conflict with the decision in the *Rood* case.

This is true because the result in this case is supportable on the second and independent ground of the decision below, namely, that the complaint fails to state a cause of action. In *Brooks* v. *Dewar,* 313 U. S. 354, which arose upon the overruling of a demurrer to a bill to enjoin a subordinate of the Secretary of the Interior, it was contended

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[5] In the *Rood* case the circuit court of appeals upheld the fraud order on the merits and the petition for writ of certiorari raised only the question of the validity of that action. However, in opposing the petition the Government contended, in accordance with its position here, that even if the order was invalid, the plaintiff should not prevail since the court erred in holding that the Postmaster General was not an indispensable party. Brief for respondent in opposition, No. 91, October Term, 1936.

[6] See cases commented on in *National Conference on Legalizing Lotteries, Inc.* v. *Goldman, supra.*

that the Secretary was an indispensable party. However, the Court declined to pass upon the question. It said (at 359–360):

> We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below is sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence, where, as here, the bill fails to make a case upon the merits.

The instant case presents a parallel situation, except that here there is no occasion for this Court to grant certiorari even for purpose of determining whether the complaint states a cause of action, since that question involves no principle of law not already settled, and since the court below, unlike the supreme court of Nevada in the *Brooks* case, decided the question correctly.

2. Although it may be doubted whether the district court passed on the sufficiency of the complaint to state a cause of action apart from the question whether the Postmaster General was an indispensable party, the motion to dismiss was worded broadly enough to raise the point (*supra*, p. 6) and the judgment of dismissal was not without prejudice (R. 63–64). In any event, moreover, no substantial rights of petitioner were infringed by the action of the circuit court of appeals in holding that the complaint was insufficient. For that holding is clearly correct.

The facts alleged in the complaint regarding petitioner's enterprise (R. 13–14, 31–32) are not inconsistent with those hereinbefore summarized (pp. 3–4), shown by the evidence as quoted or described in the Acting Solicitor's memorandum recommending that the fraud order be issued. A copy of the memorandum was attached to the complaint (R. 37–61) and was relied on by petitioner as supporting the conclusions he alleged (R. 26–29). There is no allegation that the evidence therein reported is an inaccurate or incomplete reflection of the transcript of the hearing, a copy of which had been forwarded to petitioner after he had failed to appear or to be represented at the hearing (*supra,* p. 3); and the evidence is ample to support the fraud order since it shows that petitioner's representations as to the cures his machine could work, for a fee sent through the mails, were false (*supra,* p. 4).[7]

The order is in the form expressly authorized by the statute (Appendix, *infra,* p. 12) and since the Acting Postmaster General was empowered to issue it "upon evidence satisfactory to him" that petitioner was engaged in obtaining money through

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[7] Petitioner contends (Pet. 3, 19) that the Department and court below erred in relying on a "highly prejudicial" circular (R. 41) the distribution of which, as he asserts, had been discontinued by him prior to the date of the charges. However, they relied also on a leaflet (R. 43–50) concededly (Pet. 19) in use at the time and upon other evidence, and the evidence hereinbefore summarized is not based on the discontinued circular.

the mails by means of false representations, it was properly upheld. *Leech v. Carlile,* 258 U. S. 138, 139–140.

CONCLUSION

The decision of the court below is correct, and while in conflict with the opinion of another Circuit Court of Appeals on one point, it is sustainable on another and independent ground. It is respectfully submitted, therefore, that the petition should be denied.

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SEPTEMBER 1942.